ISSAC ALEXANDER BROTT

v.

THE QUEEN

HIGH COURT, AUSTRALIA
BRENNAN J
DEANE J
TOOHEY J
GAUDRON J
MC HUGH J
[F.C. 92/006]
25 FEBRUARY 1992

CRIMINAL PROCEDURE: *Whether applicant was guilty of forging guarantee - Elements of the crime of forgery at common law - Fraudulent intent - Inference to be drawn.*

A lessor was willing to grant a lease provided the two directors of the lessee company guaranteed performance of the lessee's covenants. The directors were Daryl Leslie Hains and Brendon Alexander Wilson. A form of lease was engrossed for execution containing the guarantee. The guarantee was purportedly signed by the guarantors and their respective signatures were purportedly witnessed by the applicant on 31 May 1985.

The lessor required settlement by 31 May 1985. To meet this requirement, the form of lease containing the purportedly executed guarantee was returned to the solicitors for the lessor by the applicant, a solicitor who had been retained to act for the lessee and for Hains and, perhaps, for Wilson.

Hain's signature was genuine, Wilson's was not, Wilson was dead. He had been murdered earlier that day. The purported signature by Wilson was placed on the document by Hains who presented it to the applicant representing that Wilson had signed it. The applicant, believing Wilson's signature to be genuine, had then signed as witness.

The question at issue was whether, the applicant was guilty of forging the guarantee. By his signature the applicant certified what was false, namely, that Wilson had signed the guarantee in his presence. But not every document which contains a false statement is a forgery. Therefore, to prove the *actus reus* of forgery at common law, it is necessary to prove not only the "making (of) an instrument containing that which is false ... but (the) making (of) an instrument which purports to be that which it is not".

Held:

[1] From these authorities, the elements of the crime of forgery at common law can be derived, namely:

(i) the making or alteration of a document

(ii) so that it tells a lie about itself

(iii) whereby another may be induced to act or refrain from acting

(iv) to the possible prejudice of some person; and

(v) the making or alteration was done with an **intention**

(a) to induce another to act or refrain from acting in reliance on the truth of the falsehood inserted by the making or alteration and,

(b) thereby to occasion prejudice to some person.

[2] In the present case, the first two elements were clearly established. The attestation by the applicant of the signing of the guarantee by Wilson was false. The document stated that Wilson executed it in the presence of I. Brott and that statement tells a lie about its execution. It is not to the point that the attesting witness was himself deceived; the falsehood consists in his certification that he could vouch for Wilson's signature - and had thus eliminated any risk of forgery of that signature. The third and fourth elements were thus established.

[3] As to the applicant's fraudulent intent, the inference which is not only open but irresistible is that the applicant intended that the lessor in granting the lease and putting the lessee into possession, should act on the assurance of the attestation that Wilson had signed the guarantee, a course which required the lessor to run the risk that Wilson had not done so. That was a fraudulent intent as that term is understood in the law of forgery. Verdict of guilty of forgery is not open to challenge.

[Appeal dismissed but special leave to appeal granted. Liberty to apply in respect of any consequential orders.]

Cases referred to:

Ex parte Charles Windsor [1865] 10 Cox CC 118 ***(foll)***
Reg. v. Ritson [1869] LR 1 CCR 200 ***(foll)***
Reg. v. Roberts [1886] 12 VLR 135 ***(cit)***
Reg. v. More [1987] 1 WLR 1578; [1987] 3 All ER 825 ***(cit)***
Reg. v. Dodge [1972] 1 QB 416 ***(foll)***
Ritson v. Wells [1939] 27 Cr App R 72 ***(cit)***
Welham v. Director of Public Prosecutions [1961] AC 103
R v. Ward [1727] 2 Str 747 [93 ER 824] ***(cons)***
R v. Harris [1834] 1 Mood 393 [168 ER 1316] ***(cit)***
Reg. v. Sharman [1854] Dears 285 [169 ER 729] ***(cit)***
Reg. v. Moah [1858] Dears & Bell 550 [169 ER 11116]; 7 Cox CC 503 ***(cit)***
Reg. v. Toshack [1849] 4 Cox CC 38 ***(cit)***
State v. Gherkin [1847] 29 NC 163 ***(cit)***
R v. Forbes [1835] 7 Car 224 [173 ER 99] ***(cit)***
Reg. v. Beard [1837] 8 Car [173 ER 434] ***(cit)***
Reg. v. Parish [1837] 8 Car [173 ER 413] ***(cit)***
Reg. v. Beardsall [1859] 1 F & F 529 [175 ER 839] ***(cit)***
Reg. v. Hartshorn [1853] 6 Cox CC 395 ***(cons)***
Seal v. Claridge [1881] 7 QBD 516 ***(cons)***
Sharpe v. Birch [1881] 8 QBD 111 ***(cons)***
Ford v. Kettle [1882] 9 QBD 139 ***(cit)***
Reg. v. Martin [1879] 5 QBD 34 ***(cit)***
R v. Dunn [1765] 1 Leach 57 ***(57)***
Tuck & Sons v. Priester [1887] 19 QBD 629 ***(cit)***
Scott v. Cawsey [1907] 5 CLR 132 ***(cit)***
R v. Adams [1935] 53 CLR 563 ***(cit)***
Beckwith v. The Queen [1976] 135 CLR 569 ***(cit)***
Waugh v. Kippen [1986] 160 CLR 156 ***(cit)***
Welham v. Director of Public Prosecution [1961] AC 103 ***(cit)***
Murphy v. Farmer [1988] 165 CLR 19 ***(cit)***
The Queen v. Hasket [1975] 1 NZLR 30 ***(cons)***
R v. Parkes and Brown [1797] 2 Leach 775 [168 ER 488] ***(cit)***
R v. Marshall [1804] Russ & Ry 75 [168 ER 691] ***(cit)***
Reg. v. Parkinson [1896] 22 VLR 73 ***(cit)***
Reg. v. Mitchell [1844] 1 Den 282 [169 ER 246] ***(cit)***

Reg. v. Blenkinsop [1848] 1 Den 276 [169 ER 244] ***(cit)***
Reg. v. Griffiths [1858] Dears. & Bell 548 [169 ER 1114] ***(cit)***
Reg. v. Milton [1866] 10 Cox CC 364 ***(cit)***
Reg. v. Bateman [1845] 1 Cox CC 186 ***(cit)***
R v. Dunn [1765] 1 Leach 57 ***(cit)***
Reg. v. Reardon [1965] NZLR 473 ***(cit)***
R v. Clark [1946] NZLR 522 ***(cit)***
Reg. v. Riley [1896] 1 QB 309 ***(cit)***
In re Arton (No. 2) [1896] 1 QB 509 ***(cit)***

Legislations referred to:
Crimes Act 1958 [Vict][Aust], s. 83A
Criminal Code [WA][Aust], s. 473
Crimes (Computers) Act 1988 [Vict.][Aust], s. 7
Crimes Legislation (Miscellaneous Amendments) Act 1989 [Vict][Aust], s. 6
Public Health Act 1848 [UK], s. 25 (11 & 12 Vict. c. 63)

Others source referred to:
East's Pleas of the Crown (1803), Vol. 2, pp. 852, 854
Textbook of Criminal Law, Glanville Williams, 2nd Edn. (1983), p. 892
A History of English Law, Holdsworth, Vol. 4, 3rd Edn. (1945), pp. 502-503
"Forgery and Falsity", Glanville Williams, Criminal Law Review, (1974) 71, at p. 80
Blackstone, Commentaries 18th Edn., Vol. 4, p. 247
The Rise and Fall of Forgery, Hogan, Criminal Law Review, (1974) 81, p. 82;
Criminal Law: Report on Forgery and Counterfeit Currency, Law Commission Report, but cf., No. 55, (1973), para. 14
Outlines of Criminal Law, Dr. Kenny, 1st Edn. (1902), pp. 255-257
Blackstone, Commentaries, (1769), Bk. 4, p. 245
Halsbury's Law of England, 4th Edn. Vol. 12, para. 1331
What is a Document?, Glanville Williams, [1948] 11 Modern Law Review 150
Shorter Oxford English Dictionary, (1978), Vol. 1, p. 791
Bacon's Abridgment (1813), Vol. 3, p. 277

For the applicant - Grace and Macgregor
For the respondent - J.M. Buckley

JUDGMENT

Brennan J:

The relevant facts are these: a lessor was willing to grant a lease provided the two directors of the lessee company guaranteed performance of the lessee's convenants. The directors were Daryl Leslie Hains and Brendon Alexander Wilson. A form of lease was engrossed for execution containing the guarantee. The guarantee was purportedly signed by the guarantors and their respective signatures were purportedly witnessed by the applicant on 31 May 1985. The form of execution was as follows:

Signed Sealed And Delivered	)	
by the said Daryl Leslie	)	(Sgd) D.L. Hains
Hains in the presence of:	)	
(sgd) I. Brott		
Signed Sealed And Delivered	)	
by the said Brendon Alexander	)	(Sgd) B. Wilson
Wilson in the presence of:	)	
(Sgd) I. Brott		

The lessor required settlement by 31 May 1985. To meet this requirement, form of lease containing the purportedly executed guarantee was returned to the solicitor for the lessor by the applicant, a solicitor, who had been retained to act for the lessee and for Hains and perhaps, for Wilson. Hains' signature was genuine; Wilson's was not. Wilson was dead. He had been murdered earlier that day. The purported signature by Wilson was placed on the document by Hains who presented it to the applicant representing that Wilson had signed it. The applicant, believing Wilson's signature to be genuine, had then signed as witness.

The question is whether the applicant was guilty of forging the guarantee. By his signature, the applicant certified what was false, namely, that Wilson had signed the guarantee in his presence. But not every document which contains a false statement is a forgery. In *ex parte Charles Windsor* [1865] 10 Cox CC 118, Blackburn J said:

> Forgery is the false making of an instrument purporting to be that which it is not; it is not the making of an instrument which purports to be what it really is, but which contains false statements. Telling a lie does not become a forgery, because it is reduced into writing.

Therefore, to prove the *actus reus* of forgery at common law, it is necessary to prove not only the "making (of) an instrument containing that which is false ... but (the) making (of) an instrument which purports to be that which it is not" (to adopt his Lordship's words in *Reg v. Ritson* [1869] LR 1 CCR 200, followed in *Reg v. Roberts* [1886] 12 VLR 135. Dr. Kenny *Outlines of Criminal Law*, [1902], said that "a forgery is a document which not only tells a lie, but tells a lie about itself". His pithy and accurate phrase has been adopted by the House of Lords *Reg. v. More* [1987] 1 WLR 1578; [1987] 3 All ER 825, at p. 830 see also *Reg v. Dodge* [1972] 1 QB 416. In the usual case of forgery, the falsehood is to be found in the signature to the document or in an alteration of the text of a genuine document but, as Lush J said in *Ritson* [1869] LR 1 CCR, the falsehood may "consist in the name or in any other matter". In *Ritson and Wells* [1939] 27 Cr. App. R. 72 a falsehood consisting in the insertion of a false date of execution sufficed to establish the document as a forgery. Whatever the falsehood may be, its appearance in the document must convey a false statement as to the nature or content of the document or as to its execution or authentication.

However, to prove forgery it is necessary to prove more than the making or alteration of a document which tells a lie about itself. At common law, forgery is a species of fraud and fraudulent intent is an essential element of the offence. Thus, in *Ritson*, Kelly CB [1869] LR 1 CCR, at p. 203; see also per Blackburn J at pp. 203-204 said that:

> every instrument which **fraudulently** purports to be that which it is not is a forgery, whether the falseness of the instrument consists in the fact that it is made in a false name, or that the pretended date, when that is a material portion of the deed, is not the date at which the deed was in fact executed. (Emphasis added).

The term "fraud" when used in connection with forgery is not confined to the idea of depriving a person by deceit of some economic advantage or inflicting upon him some economic loss. The meaning of "fraud" in connection with forgery was considered in *Welham v. Director of Public Prosecutions* [1961] AC 103 where Lord Radcliffe said:

> What (the law) has looked for in considering the effect of cheating upon another person and so in defining the criminal intent is the prejudice of that person what Blackstone (*Commentaries*, 18th Edn., Vol. 4, at p. 247) called 'to the prejudice of another man's right'. *East, Pleas of the Crown* [1803], Vol. 2, at pp. 852, 854, makes the same point in the chapter on Forgery: 'in all cases of forgery, properly so called, it is immaterial whether any person be actually injured or not, provided any may be prejudiced by it'.

It is not necessary to prove that any prejudice was actually suffered; a possibility of prejudice is enough: *R. v. Ward* [1727] 2 Str 747 [93 ER 824]. But there must be both a possibility of prejudice to some person and an intent to cause it. In *Welham,* Lord Radcliffe examined four cases which show that the possibility of non-economic prejudice is sufficient to establish this element of forgery *R. v. Harris* [1834] 1 Mood 393 [168 ER 1316]; *Reg. v. Sharman* [1854] Dears 285 [169 ER 729]; *Reg. v. Moah* [1858] Dears & Bell 550 [169 ER 1116]; 7 Cox CC 503; *Reg. v. Toshack* [1849] 4 Cox CC 38 and accordingly stated his opinion to be [1961] AC, at p. 125:

> that in connection with this offence the intent to defraud existed when the false document was brought into existence for no other purpose than that of deceiving a person responsible for a public duty into doing something that he would not have done but for the deceit, or not doing something that but for it he would have done. Correspondingly, to put such a document forward with knowledge of its falsity and with a similar intent was to commit the crime of uttering it.

Later in his speech, Lord Radcliffe *ibid.,* at p. 127 pointed to the contrast "between deceiving, the essence of which is to bring about a state of mind, and defrauding, the essence of which is to bring about a course of action, whether doing something or refraining from something". Lord Denning, embracing the definition of forgery in *East's Pleas of the Crown* [1803] Vol. 2 said [1961] AC at p. 133:

> The important thing about this definition is that it is not limited to the idea of economic loss, nor to the idea of depriving someone of something of value. It extends generally to the purpose of fraud and deceit. Put shortly, 'with intent to defraud' means 'with intent to practise a fraud' on someone or other. It need not be anyone in particular. Someone in general will suffice. If anyone may be prejudiced in any way by the fraud, that is enough.
>
> At this point it becomes possible to point the contrast in the statute between an 'intent to deceive' and an 'intent to defraud.' 'To deceive' here conveys the element of deceit, which induces a state of mind, without the element of fraud, which induces a course of action or inaction.

As a possibility of prejudice and a fraudulent intent are elements of forgery, an alteration to or an insertion in a document of a falsehood which is immaterial to the prejudicial effect which the document is intended to have will not found a charge of forgery. If the falsehood is incapable of including another to engage in conduct to the prejudice of any person, there is no possibility of prejudice and it is unlikely that the falsehood would have been placed in the document for the purpose of causing prejudice. To ascertain whether the falsehood is immaterial, it is legitimate to consider whether the document containing the falsehood would have the same effect if it did not contain the falsehood. In adopting this approach, it is necessary to identify precisely the effect which the falsehood could possibly have and the effect which the insertion of the falsehood was intended to have. If the insertion of the falsehood creates no possibility of prejudice, there is no forgery. An example can be found in *State v. Gherkin* [1847] 29 NC 163 where obligors executed a bond and delivered it as their bond to the obligee but one of the obligors added a false name to the bond as a subscribing witness. There was no need for the obligors' signatures to be witnessed. It was held that there was no forgery. Daniel J *ibid*., at p. 165 said:

> It was not an alteration in a material part of a true document, by which the obligee was or could be defrauded of the money mentioned in the face of the bond.

Nor is there a forgery when a signature is placed on a document by a person having the purported signatory's authority to do so. *R. v. Forbes* [1835] 7 Car; *Reg. v. Beard* [1837] 8 Car; *Reg v. Parish* [1837] 8 Car; *Reg v. Beardsall* [1859] 1 F & F. 529. A ruling by

Crompton J sitting in the Staffordshire Assizes in *Reg v. Hartshorn* [1853] 6 Cox CC 395 might be explained on this basis. There, a statute provided that illiterate voters should place their mark on a ballot paper and have the mark attested by a witness. The witness placed his signature on the voting paper when the mark had been placed on it not by the voter but by another person, albeit with voter's express or implied consent. His Lordship ruled that there was no forgery, saying *ibid.*, at p. 402:

> There is no false statement implied, and the essence of the crime of forgery is making a false entry or signature, knowing it to be without authority and with intent to defraud.

From these authorities, the elements of the crime of forgery at common law can be derived, namely:

1. the making or alteration of a document;
2. so that it tells a lie about itself;
3. whereby another may be induced to act or refrain from acting
4. to the possible prejudice of some person; and
5. the making or alteration was done with an **intention:**
   (i) to induce another to act or refrain from acting in reliance on the truth of the falsehood inserted by the making or alteration, and
   (ii) thereby to occasion prejudice to some person.

In the present case, the first two elements were clearly established. The attestation by the applicant of the signing of the guarantee by Wilson was false. The document states that Wilson executed it in the presence of I. Brott and that statement tells a lie about its execution. A witness who attests a signature by a party to a transaction is a person who is present at the signing and who sees what passes and who shall, when required, bear witness to the facts: *Seal v. Claridge* [1881] 7 QBD 516; *Sharpe v. Birch* [1881] 8 QBD 111. "The thing must be done in the presence of the man who in the future will be able to testify that it was done": per Jessel MR in *Ford v. Kettle* [1882] 9 QBD 139. The materiality of the attestation is that it was apt to induce the lessor to believe that both the guarantors had duly signed the guarantee and, acting on that mistaken belief, to execute the instrument of lease and to put the lessee into possession. A lessor who is induced a grant a lease and to put a lessee in possession by a false attestation of a guarantor's signature is prejudiced, for contrary to his belief, such a lessor has no assurance as to the due signing of the guarantee. The risk of forgery of the guarantor's signature if borne by the lessor, whereas that risk would not have existed if the signature had been truly attested. It is not to the point that the attesting witness was himself deceived; the falsehood consists in his certification that he could vouch for Wilson's signature - and had thus eliminated any risk of forgery of that signature. The third and fourth elements were thus established. As to the applicant's fraudulent intent, the trial Judge directed the jury in these terms:

> The expression 'an intention to defraud' is quite often an element in charges heard in these Courts. Usually it means in a financial sense. The real allegation made in such cases is to defraud someone in a financial sense. But I direct you that this is not necessarily the case. There can be an intention to defraud without there being an intention to deprive financially. For these purposes an intention to defraud can be defined as an intention to cause another to act to his possible detriment. What the Crown says here is that it was intended by Brott that the (lessor) would believe that the ... guarantee ... was a properly executed guarantee and that

is by a party that was alive and in Brott's presence when signing and that so believing it might act to its possible detriment, that is by proceeding with the lease of the shop which it apparently did here.

There was no error in this direction. In his unsworn statement to the jury, the applicant said: "My concern was simply that the lease went off (scil. to the lessor's solicitor) and that the transaction was effected on behalf of the client." Clearly his intention was that, by the appearance of due execution of the guarantee, the lessor would be induced to execute the instrument of lease and to put the lessee into possession. True it is that, on the facts as they must be taken to be in the present case, the applicant believed that Wilson had signed the guarantee. Nevertheless, the inference which is not only open but irresistible is that the applicant intended that the lessor, in granting the lease and putting the lessee into possession, should act on the assurance of the attestation that Wilson had signed the guarantee, a course which required the lessor to run the risk that Wilson had not done so. That was fraudulent intent as that term is understood in the law of forgery.

In my opinion, the verdict of guilty of forgery is not open to challenge. I would grant special leave to appeal but dismiss the appeal.

Deane J:

The detailed facts and the issues involved in this application for special leave to appeal are set out in the joint judgment of Toohey and Gaudron JJ.

The offence of forgery has been said to have been "invented by the Judges" see, eg. Glanville Williams, *Textbook of Criminal Law*, 2nd Edn., (1983), p. 892; Holdsworth, *A History of English Law*, Vol. 4, 3rd Edn. (1945), pp. 502-503. Statements to that effect are not intended to be complimentary in that they are commonly made in the context of comment about undesirable subtleties see, eg. Glanville Williams, *Forgery and Falsity*, *Criminal Law Review* (1974) 71, at p. 80 or about whether "we need" such a general offence at all Glanville Williams, *Textbook of Criminal Law*, p. 892; and see Hogan, *The Rise and Fall of Forgery*, *Criminal Law Review* (1974) 81, at p. 82; but cf. *Criminal Law: Report on Forgery and Counterfeit Currency*, Law Commission Report, No. 55, [1973], para. 14. While they tend to underestimate the extent of legislative involvement from very early times see, eg. the succession of statutes consolidated in The Forgery Act 1861 (U.K.) (24 & 25 Vict. c. 98); and generally, Kenny, *Outlines of Criminal Law*, 1st Edn. (1902), pp. 255-256 , the criticism which they imply is not without justification in that, as will be seen, the effect of judicial exegesis of the offence of forgery is that the borderline between what does and what does not constitute the offence can be extremely difficult to identify in the circumstances of a particular case.

The common law offence of forgery of a document or writing was defined by *Blackstone Commentaries*, (1769), Bk. 4, p. 245 as "the fraudulent making or alteration of a writing to the prejudice of another man's right". The offence has, however, long been given a narrower and more technical content. It "has always been interpreted in a restricted sense - the phrase that is used is that the document must tell a lie about itself" per Phillimore LJ, *Reg v. Dodge* [1972] 1 QB 416, and see also, *Reg. v. More* [1987] 1 WLR 1578; [1987] 3 All ER 825. The bare description of the objective element of forgery as the making or altering of a document or writing so that it tells "a lie about itself" can, however, be logically unhelpful and even misleading in some circumstances since a document can tell a lie "about itself" without being a forgery. For example, a document which does no more than untruthfully evaluate its own contents or describe the circumstances in which it was written - "carefully researched", "unbiased", "unsolicited", "written in haste" - may accurately be said to tell "a lie about itself". That "lie about itself" does not, however, mean that the document is "forged" for the

purposes of the common law offence. The reason why that is so is that the phrase "tell a lie about itself", when used to identify the objective element of the offence of forgery of a document or writing, is used in the sense that the document or writing itself purports to be "that which it is not" *Ex parte Charles Windsor* [1865] 10 Cox CC 118, (Blackburn J); *Reg v. Ritson* [1869] LR 1 CCR 200, (Kelly CB and Blackburn J). It is not a forgery of an instrument or writing to make or alter it so that it merely tells a lie, that is to say, so that it is "an instrument which purports to be what it really is, but which contains false statements" per Blackburn J, *Ex parte Charles Windsor* [1865] 10 Cox CC. In other words, a false statement in a document or writing will not cause the document or writing to be a forgery unless that false statement goes to the nature of the document or writing and clothes it with a false character. "[I]n all forgeries the instrument supposed to be forged must be a false instrument in itself" per Cockburn CJ (Lush J, Huddleston B., Lindley and Hawkins JJ concurring), *Reg. v. Martin* [1879] 5 QBD 34, quoting *R. v. Dunn* [1765] 1 Leach 57.

In the present case, Wilson's "signature" on the guarantee of lease, which was added by Hains after Wilson was dead, was forged. The result was that the guarantee itself was a forgery. It purported to be a valid written guarantee by Wilson whereas it was a nullity which had never been executed by Wilson at all. The applicant's signature after the words "**Signed Sealed And Delivered** by the said **Brendon Alexander Wilson** in the presence of:" was not, of itself, a forgery. It did, however, convey two misrepresentations of fact about the guarantee. The first was that the guarantee had been executed by Wilson. The second was that the signature of Wilson had been affixed in the applicant's presence. The second misrepresentation, as distinct from the first, was false to the knowledge of the applicant and the applicant does not dispute that it was open to the jury to find that he possessed the necessary intent to defraud in the sense that he had intended others to act on the basis that the guarantee had been executed in his presence.

If, under the law of Victoria, a guarantee of lease was invalid unless executed by the guarantor in the presence of a witness who attested, as part of the instrument of guarantee, that it had been so executed, the applicant would, in my view, have been guilty of the offence of which he was convicted, namely, of having "forged (the) guarantee of lease". If that had been the position under Victorian law, the applicant's signature on the guarantee would have constituted a representation by the document or writing that it satisfied an essential requirement of a valid guarantee. The effect would have been that the instrument of guarantee itself purported to be what it was not. There was, however, no such requirement under the law of Victoria. Under that law, a guarantee of lease is effective even though the execution of it by the guarantor is unwitnessed *Halsbury's Laws of England*, 4th Edn., Vol. 12 para. 1331.

Again, if the applicant had known that Wilson's "signature" was forged, he would, in my view, have been guilty of the crime of which he was convicted. Even though not essential for validity, the applicant's signature was not an irrelevant addition to the actual instrument of guarantee. It constituted part of it. It was a representation, made by the instrument itself, to the effect that the guarantee had been executed by the named guarantor in the presence of the applicant. As such, the applicant's signature constituted an integral part of the representation by the guarantee that the guarantee itself was that which it was not, that is to say, that it was an effective guarantee executed by Wilson as the named guarantor. If the applicant had known that the signature of Wilson was forged, he would have had the necessary *mens rea* in that the addition of his signature would, to his knowledge, have constituted an integral step in the actual production of the forged guarantee.

In fact, however, it is not now suggested that the applicant knew, at the time he added his signature, that the signature of Wilson was forged. It is now common ground that it must be assumed that the applicant believed that Wilson's signature was genuine and that, at least in so far as *mens rea* is concerned, the applicant's position is the same as it would have been if Wilson's signature had in fact been genuine. On that basis, the applicant neither intended nor believed that his signature would constitute a "lie" or false representation that the guarantee had been executed by the named guarantor. He believed and intended that the guarantee was and would be valid and effective and that the only lie that would be involved in the assertion that the guarantee had been executed by Wilson in his presence was that he had been present when Wilson executed the guarantee when in fact he had not been present.

In these circumstances, the answer to the question whether the applicant was guilty of the offence of having forged the guarantee turns upon the answer to a question which can be posed in abstract terms. That question is whether a person who adds his or her signature to a valid and effective instrument of guarantee which has been executed by the guarantor out of his or her presence is guilty of forging the guarantee if the effect of his or her signature is that the instrument of guarantee then asserts that the guarantor had executed it in his or her presence. In my view, in a case such as the present where the signature or presence of an attesting witness was not necessary for validity, that question should be answered in the negative. It is true that it can be argued that the addition of the witness' signature in such a case is to alter the guarantee so that it purports to be what it is not, namely, a guarantee executed in the presence of an attesting witness. However, in a context where the presumption of innocence militates against conviction of a serious crime on the basis of ambiguities and subtleties See, eg. *Tuck & Sons v. Priester* [1887] 19 QBD 629; *Scott v. Cawsey* [1907] 5 CLR 132; *R. v. Adams* [1935] 53 CLR 563; *Beckwith v. The Queen* [1976] 135 CLR 569; *Waugh v. Kippen* [1986] 160 CLR 156; *Murphy v. Farmer* [1988] 165 CLR 19, the preferable view seems to me to be that the addition of the signature by the witness in such a case does not produce the consequence that the document relevantly purports to be what it is not. In such a case, the document purports to be what it is, namely, a valid and binding guarantee. By the addition of the signature, the witness does not impart a false character to the document but merely clauses "an instrument which purports to be what it really is" See *Ex Parte Charles Windsor* [1865] 10 Cox CC, at p. 123 to contain a false statement. As has been seen, that is not sufficient to constitute the offence of forgery of the relevant instrument. It could, of course, constitute other criminal conduct See, eg. Crimes Act 1958, s. 83A (Vict), (introduced in 1988) and give rise to civil liability for any consequential loss sustained by others.

It follows that the applicant's conviction of forgery cannot be allowed to stand. Accordingly, special leave to appeal should be granted, the appeal should be allowed and orders should be made which will have the effect that the applicant's conviction of forgery is quashed. The applicant has not sought to attack his conviction of the offence of uttering nor argued that the effect of quashing his conviction of forgery is that the twelve months' good behaviour bond, which has now run its course and which was imposed in respect of both the conviction of forgery and the conviction of uttering, should be set aside or retrospectively varied.

Toohey and Gaudron JJ:

The applicant, Issac Alexander Brott, was convicted of two offences, one of forgery and the other of uttering. His application for special leave to appeal to this Court, as argued, relates only to the conviction of forgery.

At the time of the events giving rise of the charges against the applicant, forgery was a common law offence in Victoria. Subsequently, it became the subject of statute The Crimes Legislation (Miscellaneous Amendments) Act 1989 (Vict.) s. 6 amends the Crimes Act 1958 (Vict.) so as to abolish the common law offence of forgery. The Crimes (Computers) Act 1988 (Vict.), s. 7 introduced into the Crimes Act a new offence of falsifying documents. The presentment against the applicant relevantly charged that on or about 31 May 1985:

> With intent to defraud [he] forged a guarantee of lease to wit a guarantee of the lease made between Centrepoint Custodian Pty. Ltd. and Haison Investments Pty. Ltd. dated the 31 of May 1985 the said guarantee purporting to be signed by Brendan Alexander Wilson in the presence of Isaac Alexander Brott.

The applicant is a solicitor. Centrepoint Custodian Pty. Ltd. (Centrepoint) let a shop in Bourke Street, Melbourne to Pratosti Pty. Ltd., a company controlled by two men named Hains and Stanley. The lessee fell into arrears with rent and eventually it was arranged that the lease be surrendered and a fresh lease granted to Haison Investments Pty. Ltd. (Haison), a company controlled by Hains and another man, Wilson. To give effect to the arrangement, a surrender of lease was prepared together with a new lease, to which was attached a guarantee to be executed by Hains and Wilson.

The guarantee was in the form of a deed which contained the usual attestation clause for each of the two sureties. One of the clauses reads:

> **Signed Sealed And Delivered**)
>
> by the said **Brendon Alexander**)
>
> **Wilson** in the presence of :)

Centrepoint was insisting that the new arrangement be finalised and it required settlement by 31 May 1985. Its solicitors sent the new lease and guarantee to the applicant who was acting for Haison and for Hains and it seems likely, also for Wilson. On the afternoon of 31 May the applicant returned the lease and guarantee to Centrepoint's solicitors, the lease purporting to have been executed by Haison and the guarantee by Hains and Wilson. The document bore what purported to be Wilson's signature and the relevant attestation clause carried the applicant's signature as witness. Wilson did not sign the guarantee in the presence of the applicant; in fact he had been murdered earlier that day. Hains forged Wilson's signature on the document and told the applicant that it was Wilson's signature.

It should be noted that the primary way in which the case against the applicant was presented to the jury, namely, that the applicant was a party to the forging of Wilson's signature, was withdrawn from the jury by the trial Judge. The case went to the jury on the Crown's alternative argument, namely, that even if Wilson's signature had been genuine, the applicant had committed forgery by signing as an attesting witness when Wilson's signature had not been affixed in his presence.

One other matter should be noted at this stage. Intent to defraud is an essential element of forgery at common law. Intent to defraud is not generally an element of forgery under the Criminal Codes although the offence is not committed unless the accused made the false document with intent that it be used or acted upon to the prejudice of another. But the Criminal Code (W.A.), s. 473 now provides that a person who forges a record "with intent to defraud" commits an offence. The presentment alleges intent to defraud in general terms. The question of intent to defraud was not before the Court of Criminal Appeal of Victoria nor was it argued before this Court. The application must therefore be dealt with on the footing that the applicant does not challenge that what he did was done with intent to

defraud. Intent to deceive is not necessarily intent to defraud. The letters written by Cyrano de Bergerac to Roxanne were intended to deceive as to their authorship; they were not intended to defraud the recipient. In any event, such letters may not be capable of giving rise to a forgery on the ground that they serve an aesthetic, emotional or personal purpose rather than mere "symbolic utility": see Glanville Williams, *What is a Document?*, [1948] 11 Modern Law Review 150.

The application for special leave to appeal concerns one basic question, a question which is not free from difficulty. It is whether it can be forgery for an attesting witness to sign as such when the instrument has not been executed in the presence of that person. In essence, the applicant's case was that he had done no more than make a false representation in the instrument about an extrinsic matter, namely, that Wilson had executed the guarantee in his presence. This, he argued, could not constitute forging the guarantee.

Discussions of the concept of forgery at common law usually begin with Blackstone who defined forgery as "the fraudulent making or alteration of a writing to the prejudice of another man's right" *Commentaries*, [1769], Bk. 4, p. 245. While the etymology of the word suggests no more than the shaping of something by heating in a forge and hammering see, for instance, *The Shorter Oxford English Dictionary*, [1978], Vol. 1, p. 791, in law it took on "all evil sense" and "at common law denoted a false making (which includes every alteration of or addition to a true instrument)" Lord Denning in *Welham v. Director of Public Prosecutions* [1961] AC 103, quoting from *East, Pleas of the Crown*, (1803), Vol. 2, p. 852.

In the Court of Criminal Appeal Young CJ approached the matter by asking simply whether the applicant made or altered the guarantee. The Chief Justice then observed that the applicant could hardly be said to have "made" the guarantee. Although he thought that the next question was "the difficult part of the case", he concluded that the applicant did not "alter" the guarantee. He observed of the applicant:

> He added a false statement to it but I should not have thought that he could be said to have altered it. It had no different operation or effect after he had appended his signature than it did before.

This was much the approach taken by the Supreme Court of North Carolina in *State v. Gherkin* [1847] 29 NC 163 when the question was whether the defendant could be guilty of forgery by adding the name of a witness to a genuine bond that required no subscribing witness. In a short judgment delivered by Daniel J, the Court *ibid* said:

> A subscribing witness is not material to the due making of a bond. The putting of the name of Stubbs to the instrument, as a subscribing witness, did not vitiate the bond, after it was subsequently delivered by the obligors to the obligee. The bond could have been established (if denied by the obligors) by proof of their hand-writing. *Blackwell v. Lane*, 4 Dev. & Bat. 113. It was not an alteration in a material part of a true document, by which the obligee was or could be defrauded of the money mentioned in the face of the bond. We think the judgment was right.

The approach taken by Young CJ was not shared by the other members of the Court of Criminal Appeal, Brooking and Murphy JJ. Their Honours' conclusion that the applicant had forged the guarantee was dictated by a line of authority which answers the question whether a document is a forgery by asking the question - does this document tell a lie about itself as opposed to a lie about something extrinsic? This approach goes back at least to *Ex parte Charles Windsor* [1865] 10 Cox CC 118 and has been used where forgery, both as a common law and as a statutory offence, has been involved see, for instance, The *Queen v. Dodge* [1972] 1 QB 416; The *Queen v. Haskett* [1975] 1 NZLR 30. In Windsor Blackburn J said [1865] 10 Cox CC, at p. 123:

> Forgery is the false making of an instrument purporting to be that which it is not; it is not the making of an instrument which purports to be what it really is, but which contains false statements. Telling a lie does not become a forgery, because it is reduced into writing.

In amplification of this test, Murphy J said in the present case:

> Accordingly, the issue appears to be whether what the appellant did was simply to make a false statement in and concerning the dead of guarantee or whether by falsely attesting, he gave the document an appearance that it would otherwise not have had, so that, to use the common expression 'it tells a lie about itself.

His Honour concluded:

> the document, because of the falsity of the appellant's entry, told a lie about itself and amounted to more than simply a false statement in the document. Although not necessary to make the document a guarantee, it was not simply a valid guarantee that the lessor wanted, but a document executed in the form provided and as set out in it.

Brooking J considered that, in the circumstances of the case, it was helpful to look at the "tell a lie about itself" test "in terms of materiality". He thought that in the present case:

> Attestation was material, not because it went to validity, but because of its practical or commercial significance as affording both a safeguard against forgery and a means of proof in the event of litigation.

The test postulated in the authorities referred to may, in many cases, admit of ready application and provide a satisfactory answer to the question whether there has been a forgery. But it has its difficulties and tends to distract attention from the basic issue whether the accused "made" or "altered" the document in question.

Counsel for the applicant argued that the charge of forging "a guarantee of lease" referred, not just to a piece of paper containing his signature, but to a piece of paper having a certain character and legal effect. The next step in the argument was that the applicant could not be said to have forged the guarantee unless what he did altered the character or legal effect of the document and that nothing he did constituted such an alteration. There are decisions supporting the view that it is not essential that the forger should have altered the character or legal effect of the document see, for instance, *The Queen v. Toshack* [1849] 4 Cox CC 38; *The Queen v. Sharman* [1854] Dears. 285; *The King v. Hawkeswood* [1783] 1 Leach 257; *The Queen v. Roberts* [1886] 12 VLR 135. But the question was not considered in any depth in those cases and in any event arose in circumstances where the instrument was, apart from the accused's conduct, a nullity or where the character of the document was not such as to create legal relations.

It is not in dispute that, if what the applicant did altered the character or effect of the guarantee, he forged the document (the other elements of the offence having been made out or conceded). But, what if his action had no more than practical or commercial significance for another party to the guarantee on for someone concerned in the transaction of which the guarantee was part? Brooking J observed of the argument before the Court of Criminal Appeal:

> The argument might have been, but was not, put in terms of the law's requirement of materiality. It might have been put that, because the actual absence of attestation did not affect the validity of the deed, the document was not, or could not have been found by the jury to be, false in a material particular.

But that argument was put to us and so must be dealt with. By placing his signature on the guarantee, the applicant attested his role as a witness. He was asserting that Wilson had executed the guarantee in his presence. That assertion was false. While the witnessing of the guarantee was not vital to its efficacy, it no doubt had some commercial significance. It was on its face evidence that Wilson had executed the guarantee. But, "[t] telling a lie does not become a forgery, because it is reduced into writing." The signature of the applicant did not tell a lie about itself and did not have the effect of making the guarantee lie; it was the signature of the person (the applicant) by whom it purported to have been made. This was a lie about the circumstances in which the guarantee was executed rather than a lie about the guarantee itself. It is not enough that what the applicant did may have had commercial significance.

The applicant signed his name to a document in circumstances where a reader of the document would conclude that the party whose signature was attested had signed in the presence of the applicant. Perhaps more accurately, the reader would conclude that at least someone purporting to be the party had appeared before the witness because, unless required to do so, for example on a passport application, a witness does not warrant by his or her signature that the party to the document was personally known to the witness. On the face of the document in this case there was an assertion by the applicant that Wilson had signed the guarantee in his presence. Was that forging the document?

The answer to that question must be "no". Nothing the applicant did made or altered the character or legal effect of the guarantee. A decision which is helpful in this regard is *The Queen v. Hartshorn* [1853] 6 Cox CC 395. A statute providing for the election of members of local boards of health directed that votes be given by means of voting papers and provided that, if any voter could not write, "he shall affix his mark at the foot of the voting paper in the presence of a witness, who shall attest and write the name of the voter against the same, as well as the initials of such voter against the name of every candidate for whom the voter intends to vote" Public Health Act 1848 (U.K.) (11 & 12 Vict. c. 63), s. 25. The defendants went to the homes of certain voters to assist in completing voting papers and, having obtained the voters' consent, filled in the papers with the names and marks of the voters and put their own names as attesting witnesses without obtaining the actual signatures or marks of those persons. Crompton J stopped the case, saying that although the procedure was irregular it did not amount to forgery. He said [1853] 6 Cox CC, at p. 402:

> It is possible that the irregularity committed may be indictable, as it is clear the statute intended that the voter should affix his mark *propria manu*, but the attestation in the mode adopted in this case is not forgery. There is no false statement implied, and the essence of the crime of forgery is making a false entry or signature, knowing it to be without authority and with intent to defraud.

In the present case we are not concerned with whether the applicant committed some other offence or the consequences of his conduct for his professional career. The question is whether he forged the guarantee. In our view he did not; the character and effect of the document remained unchanged. There should be special leave to appeal, the appeal allowed and the conviction quashed.

McHugh J:

The question in this application for special leave to appeal against a conviction of forgery is whether a person is guilty of forging a guarantee when he or she signs an attestation clause that falsely asserts that the signature of the guarantor was made in his or her presence. It is common ground that this question has to be determined by reference to the common law doctrine of forgery.

The applicant, a solicitor, was convicted of forging "a guarantee of lease". The guarantee bore what purported to be, but was not in fact, the signature of Brendon Alexander Wilson. Under the words "Signed Sealed And Delivered by the said Brendon Alexander Wilson in the presence of:" was the applicant's signature. Wilson was dead. His signature had been forged by a client of the applicant. The client, who was a co-guarantor of the lease, represented to the applicant that Wilson had signed the document. The applicant later signed the attestation clause and returned the lease and guarantee to the solicitors acting for the lessor.

At common law, forgery is the false making or alteration of a written instrument with intent to defraud *R. v. Parkes and Brown* [1797] 2 Leach 775; East, Pleas of the Crown, [1803], Vol. 2, p. 852; *Ex Parte Charles Windsor* [1865] 10 Cox CC 118. In *Parkes* [1797] 2 Leach 785 [168 ER, at p. 492], Grose J giving the judgment of the Court said:

> the definition of forgery is, 'the false making a note or other instrument with intent to defraud': A note or other instrument may be falsely made, either by putting on it the name of a person who does not exist, as in the case of *Rex v. Traft* [1777] 1 Leach 172 [168 ER 189], or by putting on it the name of a person who does exist, without the consent of such person, as in the case of *Rex v. Bolland* [1772] 1 Leach 83 [168 ER 144].

In *Reg. v. Ritson* [1869] LR 1 CCR 200, Blackburn J said that it was not forgery to make an instrument containing that which was false; forgery consisted in "making an instrument which purports to be that which it is not". It is commonly said, therefore, that to be a forgery an instrument must tell a lie about itself. That statement is helpful in distinguishing between documents which are forgeries and documents which merely contain false statements about matters extrinsic to the document. But, in my opinion, it is not the decisive test of forgery.

To constitute forgery, the making or alteration of an instrument must falsely attribute a statement or representation to the person purporting to have signed or acknowledged that part of the instrument which contains the statement or representation. As Crompton J said in *Reg v. Hartshorn* [1853] 6 Cox CC 395, "the essence of the crime of forgery is making a false entry or signature, knowing it to be without authority and with intend to defraud".

In the paradigm case of forgery, the offence consists in signing another person's name, real or fictitious, to an instrument with intent to defraud *R v. Marshall* [1804] Russ & Ry 75 ; *Reg v. Toshack* [1849] 4 Cox CC 38; *Reg v. Parkinson* [1896] 22 VLR 73. However, it is forgery for a person to sign his or her own name to an instrument with intent to defraud if the surrounding circumstances show that the document would be understood as being the instrument of another person of the same name *Reg. v. Mitchell* [1844] 1 Den. 282 ; *Reg v. Blenkinsop* [1848] 1 Den. 276. It is also forgery to add to or alter material in a document with intent to defraud if the effect of the addition or alteration is to represent that the person who signed or acknowledged the original had signed or acknowledged the addition or alteration *Reg v. Griffiths* [1858] Dears. & Bell 548; *Reg. v. Milton* [1866] 10 Cox CC 364. Furthermore, it is forgery for a person to complete a document in an unauthorised manner *Reg v. Bateman* [1845] 1 Cox CC 186.

However, if a person signs an instrument in a name other than his or her own, there will be no forgery if he or she assumed that name for the purpose of a transaction involving that instrument. In *Reg. v. Martin* [1879] 5 QBD 34, the defendant, Robert Martin, had signed a cheque in the name "William Martin", but the Court of Crown Cases Reserved concluded that the defendant had given the cheque "entirely as his own" and that this did not constitute forgery. The Court applied the resolution of the Judges in *R v. Dunn* [1765] 1 Leach 57, at p. 59 that "the instrument supposed to be forged must be a false instrument in itself; and

that if a person give a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery". In *Reg v. Reardon* [1965] NZLR 473, the New Zealand Court of Appeal held that no forgery had occurred where two persons had stayed at a hotel under false names and one of them had given a cheque in the false name in which he had registered. In *R v. Clark* [1946] NZLR 522, that Court held that it was not conclusive evidence of forgery that a person authorised to issue a licence had issued the licence in a name other than his own. It was a matter for the jury to determine whether in all the circumstances of the case the use of the other name constituted forgery.

Furthermore, a document is not a forgery merely because it contains a false representation by its makes. In *Reg v. Dodge* [1972] 1 QB 416, the English Court of Appeal held that the offences of forgery and uttering were not made out where the second defendant had shown a creditor two bonds signed by the first defendant for the purpose of assuring the creditor that the second defendant was in a sound financial position. The bonds falsely acknowledged that the first defendant was indebted to the second defendant. Phillimore LJ, who gave the judgment of the Court of Appeal, said that the words "making a false document" which occur in the statutory definition of "forgery" in the Forgery Act 1913 (U.K.) had "always been interpreted in a restricted sense - the phrase that is used is that the document must tell a lie about itself" *ibid.*, at p. 419. The false statements of indebtedness did not involve any lie about the documents.

The foregoing discussion shows that the general rule of the common law was that forgery consisted in a person, with intent to defraud, making, altering or adding to an instrument so that the instrument contained a false representation that another person had signed or acknowledged the instrument, or some part of its contents. If the document contained no more than a false representation by the person who signed or acknowledged the instrument or part of its contents, no forgery occurred. But this general rule has a notable exception: inserting or acknowledging a false date or time in an instrument with intent to defraud is forgery if the date or time is material *Ritson* [1869] LR 1 CCR; *Wells* [1939] 27 Cr. App. R. 72; *Reg v. Riley* [1896] 1 QB 309.

In *Ritson*, a man falsely backdated a deed purporting to convey land to his son. He did so with the intention of giving that conveyance priority over a deed by which he had conveyed the land to a creditor. Blackburn J said that ordinarily "the date of a deed is not material" [1869] LR 1 CCR 204. But he went on to hold that "it is here shown by extrinsic evidence that the date of the deed was material" *ibid.*, at p. 204. In *Riley*, the Court of Crown Cases Reserved applied *Ritson* and held that a postal clerk was guilty of forgery in inserting a false time of lodgment in a telegram so as to make it appear that the telegram, which contained a bet on the winner of a horse race, had been lodged before the race had been run.

It is not easy to see any real distinction, however, between a person making a false representation in a document as to the date or time on which it was made and a person making a false representation in a document that he or she is indebted to another person cf. *Dodge*. It is true that a document which bears a false date tells a lie about the date of its execution and in that sense, about itself. But that means no more than that the document is false evidence of the date of its execution. Equally, a document which contains a false acknowledgment of a debt is false evidence of the existence of the debt. In each case, the writing conveys and would be understood as conveying exactly what its author intended. Yet at common law one document is a forgery and the other is not. It is difficult to escape the conclusion that cases such as *Ritson* and *Riley* are wrong in principle because they hold that a document may be a forgery even though it attributes to a person the very representation which he or she intended to make. That is not to say the accused in *Ritson* and *Riley* were

not guilty of any crimes. In *Ritson*, the offence of conspiracy to defraud would seem to have been made out; in *Riley*, the offence of obtaining or attempting to obtain money by false pretences would seem to have been made out.

Nevertheless, the decisions in *Ritson* and *Riley* can be defended on historical grounds. The Judges in *Ritson* relied heavily on the ancient writers in reaching their conclusion that the insertion of a false date could constitute forgery. Thus, Blackburn J applied the statement in *Bacon's Abridgment* (1813), Vol. 3, tit. Forgery, p. 277 that forgery included making "a man's own act appear to have been done at a time when it was not done" [1869] LR 1 CCR 204: see also the judgments of Kelly CB *ibid*, at p. 203 and Martin B. *ibid.*, at p. 203.

Nevertheless, if it was generally true that a document may be a forgery even though it attributes to a person the very representation which that person intended to make, many documents which hitherto had not been regarded as forgeries would be so classified. Indeed, if an intent to defraud was present, any document which untruly recorded an underlying transaction would seem to be a forgery. That would mean, contrary to the decision in *Windsor* See also *In re Arton* (No. 2) [1896] 1 QB 509, that falsely recording a transaction with intent to defraud in a book of account was forgery. It would also mean that a person who prepared a document falsely recording an indebtedness or a payment would be guilty of forgery if an intent to defraud was present. If that is so, *Dodge*, as well as *Windsor*, was wrongly decided.

The rule that it is forgery to insert a false date or time in an instrument with intent to defraud is now too firmly established to be removed by judicial decision. But it is, in my opinion, contrary to principle. It is a rule, therefore, which ought not to be extended or used as an analogy if, to do so, would mean that a person was guilty of forgery even though the instrument in question attributed to that person the very representation which he or she intended to make.

In the present case, the applicant was charged with forging "a guarantee of lease". The form of the charge presents considerable difficulties for the Crown case. The applicant did not make or alter the "guarantee of lease". He filled in some blanks in the attestation clause and he subscribed his signature to that clause. But what he did not affect the guarantee itself. He did not add to or alter the effect of the guarantee which Wilson and his co-guarantor had given or appeared to give. It is not to the point that what he did made the "guarantee" seem authentic. He might equally have done that by a representation contained in a letter annexed to the guarantee. In my opinion, Young CJ was correct in holding in his dissenting judgment that the applicant had not forged the "guarantee of lease".

However, even if the applicant had been charged with forging the attestation clause, the charge would not have been made out. True it is that the attestation clause contains a false representation by the applicant. But the clause done no more than attribute to the applicant the very representation which he intended to make. It was, therefore, not a forgery. It is noteworthy that in *Welham v. Director of Public Prosecutions* [1961] AC 103 the appellant was charged with uttering, and not forgery, in circumstances where he sent a hire-purchase document forged by others to a finance company although he himself had signed the document as a witness before the signature of the hirer was inserted.

Also found at [1992] 2 CLJ 951